No. 11895

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETE FIAMENGO and NICK MARINKOVICH,

Appellants,

vs.

D/S "SAN FRANCISCO," her engines, tackle, furniture, apparel, etc., and ANDREW ZAMBERLIN, FIRST DOE and SECOND DOE, her owners,

Appellees.

APPELLEES' ANSWERING BRIEF.

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Jurisdictional Statement.

Appellees do not question the jurisdiction of the United States Circuit Court of Appeals; however, it is noted that in the first paragraph of Appellants' Jurisdictional Statement the following appears: "Appellants were wrongfully discharged as members of the crew of the D/S 'SAN FRANCISCO' April 22, 1947, . . ." This statement, of course, is contrary to the findings and is denied by the Appellees.

Statement of the Case.

In January, 1947, Appellants were employed by Andrew Zamberlin, then Master, and at all times Managing Owner and fish boss of the D/S "San Francisco." There is no testimony as to the term of their employment, although Libelants Exhibit "2," which was received in evidence after the close of Appellants case, and without any foundation or identification [Rep. Tr. pp. 179, 180], indicates that the employment was for the season.

Sometime around the middle of March, 1947, while at Navidad Bay, Mexico, waiting for the weather to clear [Rep. Tr. p. 46; Clk. Tr. p. 31, Finding VII], a party of the fishermen from the D/S "San Francisco" and another vessel, the "St. James," also anchored in Navidad Bay, went ashore early in the evening. The Appellants, Nick Zamberlin, the Master of the D/S "San Francisco," Andrew Zamberlin, the fish boss and Managing Owner of the D/S "San Francisco" were among the party.

Prior to departure, Andrew Zamberlin and the Master of the "St. James" had a discussion in the presence of the Appellants as to when the party should return to the vessels [Rep. Tr. pp. 73, 142, 143]. The substance of the discussion was that they should remain two or three hours and all return together.

When the party reached shore, they entered a small open air or partially enclosed Cantina where they partook of beer. At about 11:00 P. M. the Managing Owner and fish boss, admittedly the person who gave all orders aboard

the D/S "San Francisco" [Rep. Tr. pp. 21, 85, 86, 123, 124, 140], and the Master of the "St. James," stated in a loud voice, "Let's go" [Rep. Tr. pp. 75, 144, 145, 174]. The Appellants could not have failed to hear the command, and the Honorable District Court found that they did hear it [Clk. Tr. p. 31, Finding IX; Rep. Tr. pp. 123, 144, 145, 174]. The Appellants did not receive permission from anyone to stay ashore [Rep. Tr. pp. 132, 133, 158; Clk. Tr. p. 31, Finding X].

The Appellants remained ashore and A. W. O. L. from the vessel until approximately 5:00 A. M. the following day.

The vessel proceeded to San Pedro, discharged its cargo and went into drydock for repairs. After the vessel was again ready to sail, the Appellants came back aboard and they were informed by the fish boss and Managing Owner, with the consent of the Master, that they were discharged. No protest was made by the Appellants [Rep. Tr. pp. 66, 95] and although there is some question as to exactly what was said at the time of discharge there is no question that the Appellants and all other parties concerned were aware of the reason for discharge, to wit, the absent without leave at Navidad Bay, for the very next day, April 23, 1947, the Appellants went to their Union and had the statement executed which is in evidence as Libelants' Exhibit "1," and which statement in its opening paragraph indicates their knowledge.

Outline of Answering Argument.

Appellees, in their Answering Argument, will follow the outline set out by the Appellants.

ARGUMENT.

I.

This Appeal Is a Trial De Novo.

Although we still have the theory that an Admiralty Appeal is a trial *De Novo,* the various Circuits have uniformly limited the practice of the mentioned theory to a review of the evidence and will not disturb the findings of the District Court unless they are found to be clearly against the weight of evidence.

> *Petterson Lighterage & T. Corp. v. New York Central R. Co.*, 126 F. (2d) 992.

In the above case, Circuit Judge L. Hand, on pages 997 and 998, reviews the opinions of all Circuits upon the subject.

II.

Appellants Were Not Wrongfully Discharged.

The evidence shows that the Appellants upon the evening they went ashore in Navidad Bay knew they were to return in company with all of the others in the party; otherwise, why would they testify that they asked permission to remain ashore? [Rep. Tr. p. 61].

It is without dispute that the fish boss and Managing Owner, Andrew Zamberlin, gave all the orders to the crew of the D/S "San Francisco" [Rep. Tr. pp. 21, 85, 86, 123, 124, 140] and the District Court so found [Clk. Tr. p. 30, Finding VI]. It is also without dispute that Andrew Zamberlin gave orders to return to the ship at about 11:00 P. M. [Rep. Tr. pp. 42, 73, 75, 144, 145, 174] and the Court so found [Clk. Tr. p. 31, Finding VIII].

It is beyond serious question that the Appellants heard the order [Rep. Tr. pp. 123, 144, 145, 174], and saw everyone leaving in response thereto, and they both testify that they asked the Master permission to stay ashore [Rep. Tr. p. 61] thereby proving that they knew they were supposed to return to the ship. Permission to stay ashore was never asked of the Managing Owner and fish boss, Andrew Zamberlin, neither was it given by the Master, although the testimony is in direct conflict on the latter; however, the Court, after hearing all the testimony and observing the witnesses, found not only that they heard the order, but that no permission to stay ashore was given by anyone [Clk. Tr. p. 31, Findings IX and X].

There was, therefore, a wilful and serious infraction of discipline on the part of the Appellants, made even more serious by reason of the fact that the vessel involved was a fishing boat and as such has no set sailing time and must take advantage of the weather [Rep. Tr. p. 40]. This the Appellants well knew [Rep. Tr. pp. 89, 90]. It is further borne out by the fact that soon after the Appellants were aboard, to wit, prior to 6:00 o'clock A. M., the vessel put to sea [Rep. Tr. pp. 8, 37]. This latter in and of itself makes questionable the story of the Appellants who each testified that the Master told them that it was O. K. to stay ashore as long as they got back at 7:00 o'clock A. M. The Court had an opportunity to observe the Appellants, who both testified, and their manner and appearance, which would aid in determining the wilfulness, and the seriousness of the possible effect the action of these men could have on the rest of the crew, and the success of the vessel's enterprise, and the Court was entirely correct in finding that the act was sufficiently serious to warrant the discharge of Appellants.

The Appellants make a point of the fact that no reason was given for the termination of their employment. There can be no real question but what the Appellants fully understood, whether it was voiced or not, the reason for their discharge. The evidence shows that they did not question the order, and as has heretofore been pointed out, Libelants Exhibit "1" executed the day following their discharge shows clearly that they knew why they were discharged.

Appellants cite several cases as authority for the fact that a seaman may not *ordinarily* (italics ours) be dismissed for a single fault unless the same is of a highly aggravated character, or circumstances show him to be an unsafe and unfit man to have aboard the vessel. The cases cited, however, are distinguishable:

The "Villa Y. Herman," 101 Fed. 132.

This was a case where the Mate was drunk and going around on all fours, and there was considerable indication that the Captain was also drunk. Libelants had been hired and signed on by an agent of the Master; there was conflict as to whether the Master had given certain orders with regard to a tow line. The orders, if given, were not fulfilled, but it was questionable as to whose duty it was to fulfill them. Under such circumstances, the Court found that the discharge was not justified. The vessel was not a fishing vessel and the acts or omissions were not clear cut and certainly under circumstances far different from the instant case.

The "Donna Lane," 299 Fed. 977.

In this case there was a dispute as to whether certain work was required of the Libelants. Court found that

the Libelants were required to do the work, but that the circumstances of their not doing it was not serious, and the Court, in deciding the case, stated:

> "a single wilful disobedience of a lawful command, *at least one no more aggravated* (italics ours) than that in the present case, would not warrant, without his consent, the discharge of a seaman before the termination of the voyage."

This was not a fishing vessel and the acts or omissions in no sense comparable to the instant case.

Alaska SS Co. v. Gilbert, 236 Fed. 715.

In this case there was a dispute as to the hours at which a seaman was to go on watch. An argument developed as to whether the seaman was to receive overtime; the seaman, however, did not refuse to go on watch, but did his duties and followed orders. A Court held that his discharge was unjustifiable. Comment is unnecessary to distinguish such a case from the instant case.

The "Superior," 22 Fed. 927.

This case was decided on the question as to whether the Libelant should have been discharged in a foreign port without funds, etc., and has no bearing whatsoever on the situation such as exists here.

The "Idle Hour," 63 Fed. 1018.

This case was solely an argument over whether the seaman was hired by the day or the month and has no bearing whatsoever upon the instant case.

The "Top Gallant," 84 Fed. 356.

This case is not applicable by reason of the fact that the services were terminated by mutual consent, and the only point of the case was as to the forfeiture of *past* wages by reason of desertion. There is no question of past wages in the instant case; the Appellants have been paid up to and including the date of discharge.

Trent v. Gulf Pacific Lines, 42 F. (2d) 903.

This case is not in point inasmuch as it is a question of rights under Ship's Articles, and the Court seemed to feel that there was power under Ship's Articles, and the maritime laws applying thereto, for the Captain to have disciplined the Libelant instead of discharging him.

In the instant case, we have a fishing vessel where the men do not ship under Articles, and where they are governed by a Union Agreement, and *there exists no method of punishment for the acts of Appellants in the instant case, save discharge,* or a questionable voluntary submission of all parties to the decision of a shoreside grievance committee [see Libelant's Exhibit "2"]. The foregoing being true, a disciplinary breach such as Appellants committed becomes considerably more serious than when shipping under Articles.

Marsland v. "Yosemite," 18 Fed. 331.

This was a case where a dispute arose between a yacht owner and the Chief Engineer regarding the cleaning of certain portions of the ship. The Court held that the Engineer's conduct was negligent and blamable, but not "in any way endangering the safety *or discipline* (italics ours) of the ship." In other words, the ship was not

at sea and the infraction of orders was not in any way serious as compared to the instant case.

Being absent without leave is sufficient justification for discharge.

> *The "Cripple Creek,"* 52 Fed. Supp. 710, at pages 712, 713.
>
> "While seamen should be afforded every protection with respect to their status by reason of the hazards of their calling and while the law has jealously surrounded them with every possible safeguard, it is not to be assumed that wrongful conduct on their part is in any wise to be condoned."
>
> * * * * * * * *
>
> "It seems to me it would be a singularly odd rule of law, contended for by the libellants, which would permit them, though not actually deserters, but merely having the status of absent without leave, to be able to hold up the sailing of the ship, and to compel the Master to come back to port, and have their alleged grievances arbitrated by the Commissioner there, and upon his refusal so to do, they could be visited only with a two day deduction of wages and yet be able to claim wages to the end of the voyage."

This was, of course, a case where the men shipped under Articles, and there is raised the point that they could be punished in some other fashion than discharge; however, we believe that the language just quoted is significant and bears upon the instant case.

Buchanan v. United States, 24 F. (2d) 528.

In this case the seamen were absent without leave and the Court held that while they were not deserters, their

discharge was justifiable by reason of their absence without leave, and that the Master was even justified in leaving port without them.

The "Nereid," 67 Fed. 602.

The *"Nereid"* was a fishing vessel, and certain of the fishermen asked permission to go ashore; permission was given and they were instructed to return upon signal. An hour later the Master sounded a signal to return (which would be comparable to the order "Let's go" in the instant case). The men did not return, and the ship sailed without them. The men sued to recover wages and damages, the wages being shares. The court not only did not allow them damages, but deducted sufficient from their shares to compensate the vessel for their failure to perform their duty. The question of future wages or employment was not involved.

III.

Appellants Are Not Entitled to Recover Any Wages.

The amount of earnings that Appellants would have earned had they been permitted to remain aboard the vessel and fish is as recited in Appellants' Brief.

For the Appellants to recover, however, the Honorable District Court must be reversed and the Appellants be held to have been unlawfully discharged.

It is not believed that the citation of authority for the foregoing is necessary.

IV.

Appellants Are Not Entitled to Recover Maintenance.

The evidence is not in conflict to the effect that both of the Appellants retained a room the year round, whether at sea or not; hence, it is the contention of the Appellees that even though the District Court were reversed as to the justification for the discharge, no maintenance allowance should be made for housing, if the Appellants are granted their full share, and it is respectfully submitted that it would be an injustice to grant the full share of $2,632.65 (less withholding tax), from which there is not made the deduction for groceries, and in addition thereto give some $5.00 a day for maintenance. This, in effect, would be allowing $5.00 a day for food in addition to the grocery money included in the gross share.

Conclusion.

It is respectfully submitted that the Findings of the District Court were supported by the evidence, and that the Conclusions of law based thereon were correct, and that the judgment of the lower Court should be affirmed *in toto*.

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